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Nos. 91-464 and 91-491

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

TEAMSTERS LOCAL NO. 71,
and CONSOLIDATED FREIGHTWAYS, INC.,

Petitioners,

v.

HERMAN WALKER, BRADLEY COLESWORTHY,
TERA B. SLAUGHTER and THOMAS DILLON,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY MEMORANDUM

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Plaintiffs concede that the legal issues raised by the Union merit consideration by the Court. [Memorandum at 13-14]. Their attempts to evade their concession lack merit.

1. Plaintiffs concede that the question posed by the Union is worthy of the Court's consideration, but erroneously contend that the instant case is "factually idiosyncratic" and not a proper vehicle for raising the issue. [Memorandum at 13-14]. While the courts agree that a bi-partite committee cannot amend the contract, the Union has never argued to the contrary. Rather, this case is a perfect vehicle for determining whether a union is the guarantor of

the actions of its agent acting in a quasi-judicial capacity wholly distinguishable from the union's normal representational functions.

The record fails to support Plaintiffs' second attempt to distinguish this case. There is no evidence that Bowman did anything improper while serving on the March 20 Bi-State Committee panel. The record contains the panel's majority decision. But because arbitrators cannot be compelled to reveal their deliberations,[1] there is no evidence that Bowman was part of the majority or that he failed to raise the issue of retroactivity. It is undisputed that Bowman and Local 71 subsequently attacked the March 20 decision. [Petition at 10-11]. Bowman's mere physical presence on March 20 is insufficient to make this case idiosyncratic.

2. Plaintiffs erroneously seek to limit the scope of the Union's Petition. [Memorandum at 8-9]. While not directly challenging the findings that it failed to timely implement the mileage recalibration and delayed processing Walker's grievance, the Union did assert that these findings were contrary to the stipulations executed by the parties. [Petition at 15-16]. More importantly, Plaintiffs have not proven, and neither court found, that those two violations

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[1] *See, e.g., Local P-9, UFCW v. George A. Hormel & Co.*, 776 F.2d 1393, 1395 (8th Cir. 1985) (and cases cited); *Andros Compania Maritima, S.A. v. Marc Rich & Co.*, 579 F.2d 691, 702 (2d Cir. 1978); *DeFrayne v. Miller Brewing Co.*, 444 F.Supp. 130, 131 (E.D. Mich. 1978); *Brownko International, Inc. v. Ogden Steel Co.*, 585 F.Supp. 1432, 1435-1436 (S.D.N.Y. 1983); *Wood v. Teamsters Local 406*, 583 F.Supp. 1471, 1472-1473 (W.D. Mich. 1984).

caused the allegedly erroneous decision of the Bi-State Committee. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 567 (1976).[2] Absent a finding on causation, the violations standing alone warrant only nominal damages. *See, e.g., Carey v. Piphus*, 435 U.S. 247, 266-267 (1977).

Thus, if the Court vacates its decision, on remand the Fourth Circuit would have to consider the remaining allegations anew and would have to reconsider the Union's statute of limitations argument.[3]

3. Local 71 does not dispute Plaintiffs' contention that mid-term modifications of contracts must be ratified. Plaintiffs do not, apparently, dispute Local 71's assertion that ratification is unnecessary where the union

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[2]The Court held that "if [a union's breach of the duty of fair representation] seriously undermines the integrity of the arbitral process the union's breach also removes the bar of the finality provisions of the contract." Here there was no allegation that mere delay tainted or "seriously undermined" either the March 20 or September 16 decisions.

[3]The Union argued that the statute of limitations barred consideration of the Complaint. The District Court found that Plaintiffs acted within six months of learning of the March 20 Bi-State Committee decision. [Petition App. 23a-24a]. The Fourth Circuit did not consider the Union's statute of limitations argument. But if this Court overturns the violations based upon the March 20 decision, the Fourth Circuit would be compelled to consider whether the Complaint was timely based only upon the delay in recalibrating the mileage and the delay in the hearing.

denies that it has negotiated an amendment and where the courts have found that the apparent negotiating forum lacked authority to amend the contract. If the courts are correct, the amendment should be voided and the absence of ratification would be irrelevant. That is the issue we urge the Court to consider.

4. Plaintiffs' reliance upon *Owen v. City of Independence*, 445 U.S. 622 (1980), demonstrates the far-reaching impact of their attack on arbitral immunity. By asserting that only the arbitrator, and not his employer, is immune, Plaintiffs would hold states and the federal government liable even where judges are immune from personal liability for their judicial acts. *Cf. Stump v. Sparkman*, 435 U.S. 349 (1978). Plaintiffs would require a rule that a law firm in which an arbitrator was employed was financially liable if the arbitrator abused his authority.

More importantly, Plaintiffs would ignore the rule that union officials sitting on a grievance committee act as neutrals rather than as representatives of the union. *See* Petition at 20-21 and cases cited therein. Plaintiffs, not the Union, seek the major change in the law represented by the Fourth Circuit's decision.

5. Plaintiffs misconstrue the Employer's and the Union's reliance upon *Paperworkers v, Misco, Inc.*, 484 U.S. 296 (1987). The present case involves two arbitration decisions subject to review under the *Misco* standard. Plaintiffs never alleged that Local 71 violated its duty of fair representation in its presentation of Walker's grievances on September 16, 1986. Therefore, the September 16 award is not tainted and must be reviewed under *Misco*. There is no *de novo* review.

The September 16 award relies on a March 16 Bi-State Committee award involving Local 391's grievance and the receipt of the mileage recalibration. Assuming, *arguendo*, that Local 71 Business Agent Ken Bowman had a duty of fair representation while sitting on the March 20 Bi-State panel, he did not owe it to Local 391 or any employee represented by Local 391. Thus, the March 20 decision was not tainted by a breach of duty owed to a party in that case. *Misco* also applies and there is no *de novo* review.

In any event, Bowman argued on September 16 that the March 20 decision was wrong.

6. Plaintiffs seriously distort the record. Thay assert that "the union lost interest in implementing drivers' victory". [Memorandum at 1-2]. To the contrary, the Unions successfully fought to expand the contractual change to include trunk mileage, which provided the eventual gain for the drivers. This effort to include recalibration of the trunk mileage, not any loss of interest, delayed the recalibration process.

Plaintiffs erroneously argue that the Carolina Negotiating Committee first extended the effective date of the recalibrations beyond December 1. [Memorandum at 9-10 and n. 3]. To the contrary, the District Court and the Fourth Circuit both found that the Carolina Negotiating Committee expressly required implementation effective December 1. [Petition App. 12a-13a, 52a-53a]. Indeed, Plaintiffs stipulated that Walker and Local 71 both argued to the Bi-State Committee on September 16 that the Carolina Negotiating Committee's directive of a December 1 effective date was controlling. [Petition at 11].

Most importantly, and most egregiously, Plaintiffs assert that "the Bi-State Committee, unlike the arbitrator to whom the Committee may refer grievances, is not limited by the [collective bargaining agreement to interpreting or applying the [collective bargaining agreement]; it may even decide to change the [collective bargaining agreement] if that is the best way to reach agreement and avoid a strike." [Memorandum at 4]. If that were true, Plaintiffs would necessarily have lost before the District Court and the Fourth Circuit, both of which concluded that the Bi-State Committee amended the contract in direct violation of its contractual authority.

Plaintiffs' misunderstanding of the authority of the Bi-State Committee fatally undermines their argument concerning the obligation of the Union members of the Committee.

CONCLUSION

For the reasons stated herein and in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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